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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. 546.

JAMES R. HOFFA, THOMAS EWING PARKS and LARRY CAMPBELL,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

MOTION TO SET ASIDE JUDGMENTS OF CONVICTION.

Come now the petitioners James R. Hoffa, Thomas Ewing Parks and Larry Campbell, and respectfully move this Court for an order setting aside the judgments of conviction rendered against them in the United States District Court for the Eastern District of Tennessee, Southern Division, on March 12, 1964, and for their reasons therefor state as follows:

1. Petitioners were indicted in the District Court in May, 1963, and judgments of conviction were rendered against them on March 12, 1964. Petitioner Hoffa was sentenced to a term of imprisonment for eight years, and petitioners Parks and Campbell, together with co-defendant King, were each sentenced to a term of imprisonment for three years (R. 121-124).[1] Their convictions were affirmed in this Court in December, 1966. Petitioners have been incarcerated under these judgments since March 7, 1967.

2. Since the return of the indictment, and on many subsequent occasions, petitioners have made repeated requests of the Government to disclose whether any conversations of the petitioners or of their counsel had been electronically overheard by Government agents. The Government replied to such requests by categorically denying that such electronic eavesdropping occurred or that it had in its possession records of such overheard conversations.

3. On October 21, 1968, in response to the petitioners' pending petition for certiorari, the Government for the first time revealed that it has in its possession records of an undisclosed number of conversations in which two of the petitioners participated and which were monitored by the Government during the course of electronic surveillance (Br. in Opp. 11).[2]

4. By reason of the Government's intentional suppression for over five years, and particularly during the nineteen months of petitioners' incarceration, of evidence so vitally material to the Constitutional validity of their

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[1] "R." references are to the printed transcript of the record filed in this Court after the grant of certiorari by this Court in petitioners' original appeal (Nos. 32-35, O. T. 1966).

[2] "Br. in Opp." references are to the Government's Brief in Opposition to the instant petition for certiorari.

convictions, this Court should, in the exercise of its supervisory powers, as a deterrent to similar affronts to proper law enforcement, and to maintain the integrity and fairness of the due administration of law, set aside the judgments of conviction heretofore rendered in this cause.

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BRIEF IN SUPPORT OF PETITIONERS' MOTION TO SET ASIDE JUDGMENTS OF CONVICTION.

On October 21, 1968, the Government, for the first time in the lengthy history of this litigation, revealed that it has in its possession records of an undisclosed number of conversations in which two of the petitioners participated and which were monitored by the Government during the course of electronic surveillances (Br. in Opp. 11). The Government has chosen not to disclose to this Court the number of such monitored conversations, the date and place where such conversations occurred, the participants therein, or the content of such conversations.

Petitioners were indicted in May of 1963. Their convictions were affirmed by this Court in December, 1966. **Hoffa v. United States**, 385 U. S. 293 (1966). They have been incarcerated under the sentences imposed in this case since March 7, 1967. From the inception of this case, and on many subsequent occasions petitioners have sought in vain to determine from the Government whether any conversations of the petitioners had been electronically overheard by Government agents. Such requests have been met with repeated denials by the Government that such eavesdropping ever existed. Indeed, the Government has displayed a cavalier and far from candid approach in its representations to the Courts and to petitioners with regard to the existence and extent of its illegal electronic activities. For example, in the criminal case against petitioner Hoffa from which the instant charge of jury tampering arose, defense counsel sought the protection of the District Court against eavesdropping of counsel's conversations, and in response thereto Government counsel, a Special Assistant to the Attorney General, represented to the trial court that there had been no efforts to encroach on the privacy of petitioners or their counsel, and that said counsel had "never heard in that period of time of anyone at the Department of

Justice ever tapping any telephone lines . . . ." (App. 91a-93a).[3]

Further, after the indictment below and before trial, petitioners moved the District Court for an order permitting the inspection of all monitored conversations of the defendants, and all recorded conversations and statements of the defendants (R. 7-9). In its memorandum in opposition to such motion, the Government categorically stated that it had no "evidence obtained by wiretap or other illegal means, and no fruits of such evidence" (R. 13).

Additionally, during the trial of the cause below, the defense repeatedly suggested to the Court that they were being eavesdropped upon, and requested a hearing to determine the existence of such eavesdropping, and the Government's possession of the records of such eavesdropping (R. 61, 70, 71, 77, 78-81). Such motions were resisted by the Government, and the Government not only failed to disclose that it had such conversations in its possession, but indeed argued that the burden was on the defense to prove that eavesdropping had in fact occurred (R. 82-84).

On February 24, 1964, the defense moved to require the Government "to disclose specifically and unequivocally to the Court whether or not it has additional electronic recordings of any conversation involving the defendants" (R. 91) This motion was resisted by the Government (R. 92-94), and denied by the Court (R. 91). Indeed, one of the Government trial prosecutors said that to his knowledge there had "never been any wiretapping connected with this case at all . . ." (Appellants' Joint Appendix, **Hoffa v. United States**, U. S. C. A., 6 Cir., No. 15876-15879, p. 1025a). On another occasion said trial prosecutor stated to the trial Court:

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[3] "App." references are to the appendix filed in this Court with the instant petition for certiorari.

> "In any event, the government states emphatically, categorically, without any reservation, no phones are being tapped, no counsel is being surveilled, and no defendant is being surveilled by any agency of the federal government" (Memorandum for the United States in Opposition to Petitioners' "Motion for Relief," Nos. 32-35, O. T. 1966, p. 6).

While the original appeal of this cause was pending in this Court on certiorari, written requests were made by defense counsel of the Department of Justice to disclose the existence of electronic eavesdropping related to these petitioners. Such requests failed to produce the admission of the instant or any other electronic eavesdropping. After the affirmance of the convictions by this Court, petitioners filed herein a "Motion for Relief" based on Government electronic eavesdropping, and in response to such motion, the Solicitor General assured this Court that the allegations of eavesdropping were "totally without basis in fact" (Memorandum for the United States in Opposition to Petitioners' "Motion for Relief", Nos. 32-35, O. T. 1966, p. 7). This response of the Government, filed after the announcement of the Government's policy in **Schipani v. United States**, 385 U. S. 372 (1966), failed to reveal that the Government then had in its possession the monitored conversations of petitioners, now disclosed for the first time.

Further, in response to petitioners' motion for new trial which is the subject matter of the instant petition for a writ of certiorari, the Government filed numerous affidavits in the District Court denying the existence of electronic eavesdropping (App. 129a-171a). One of such affidavits, that of the Assistant Attorney General in charge of the Criminal Division, and who had "direct supervision" of the instant case, asserted that he had "no knowledge or information concerning any wiretap activities or

any illegal use of electronic devices" by the Government (App. 160a-161a).

The Government seeks now to excuse its earlier failure to reveal the existence of the monitored conversations on the grounds that this Court in **Kolod v. United States**, 390 U. S. 136 (1968), ruled for the first time that the Government must disclose all overhearings of a defendant's conversations, and cannot determine for itself whether such conversations are "arguably relevant" to the conviction. It is significant in this respect that **Kolod**, *supra*, was decided by this Court on January 29, 1968, and that almost nine months elapsed before the Government deigned to reveal that it does have illegally overheard conversations in its possession. In the interim, of course, the petitioners have remained imprisoned. No reference whatever was made by the Government to these conversations when the instant appeal was argued and submitted to the Court of Appeals on April 15, 1968, three months after the decision in **Kolod**. Query, whether the admission would ever have been made, had petitioners chosen not to file a petition for a writ of certiorari to review the Court of Appeals' judgment.

We submit that it is apparent from the foregoing that the Government has engaged in a consistent pattern of deception in this case in its attempt to conceal its eavesdropping activities from the Courts and from the petitioners. This pattern of deception is illustrated not only by the Government's conduct in this case, but also by the piecemeal and reticent disclosures of the Government's electronic eavesdropping generally in the past few years. It is plainly reflected in the Government's maneuvering to avoid disclosure of the full extent of its eavesdropping activities in another case involving petitioner Hoffa, to-wit, **Hoffa v. United States**, 387 U. S. 231 (1967), and in the proceedings following this Court's order therein. When that case was pending in this Court

on a petition for a writ of certiorari, the Government admitted that it had overheard one conversation of one of the defendants. After remand of the case by this Court to the District Court for a hearing, the Government during the course of that hearing revealed for the first time that indeed it had in its possession nine other overhearings of some of the defendants. **Hoffa v. United States**, 7 Cir., 3 Cr. L. Rep. 2457 (1968). Nor was this, it was to be determined later, the extent of the Government's illegal eavesdropping. For, nine months later, during the oral argument of the appeal taken from the District Court's decision on that hearing, the Government revealed for the first time that in fact it had in its possession records of an undisclosed number of overhearings of **defense counsel.**

The Court of Appeals for the Seventh Circuit inspected such overhearings of defense counsel and found that they were not relevant "to the Hoffa case **before this Court.**" **Hoffa v. United States**, 7 Cir., 3 Cr. L. Rep. 2457, 2458 (1968) (Emphasis supplied). Since the instant case is the only other pending "Hoffa case", it seems logical to suggest that such overhearings of defense counsel pertain to this case. The time, place, participants and content of these overhearings of the defendants and their counsel have even to this day not been disclosed to the defense.

The foregoing conduct of the Government in making one admission to the Supreme Court, another to the District Court, and still another to the Court of Appeals was characterized by Judge Swygert of the Court of Appeals for the Seventh Circuit as a "narrow and cavalier response to the Supreme Court's broad direction [and as conduct which] ought not to be condoned." **Hoffa v. United States**, 7 Cir., 3 Cr. L. Rep. 2457, 2460.

Additionally, the Government has continuously refused to submit to the defense or to any Court the contents

and detail of its admitted overhearing of the conversation of defense investigator Charles O'Brien and James Haggerty, petitioner Hoffa's trial counsel in this case, and in the said Hoffa case now pending in the Seventh Circuit Court of Appeals. See **O'Brien v. United States**, 386 U. S. 345 (1967). This overhearing has even to this date been withheld from the defense.[4]

Finally, during the week of October 21, 1968, in a Supplemental Memorandum filed in this Court, in **Gorman v. United States**, No. 173, O. T. 1968, the Government revealed for the first time that it had electronically overheard a conversation of Gorman, counsel for a co-defendant of petitioner Hoffa in said Seventh Circuit case.

We urge this Court that the conduct and tactics of the Government in the foregoing respects were so nefarious and contemptuous of the rights of these petitioners as to warrant this Court, in the exercise of its supervisory powers, to set aside the judgments of conviction of these petitioners. As Mr. Chief Justice Warren stated in his dissenting opinion in **Hoffa v. United States**, 385 U. S. 293, 315 (1966):

> "One of the important duties of this Court is to give careful scrutiny to practices of government agents when they are challenged in cases before us, in order to insure that the protections of the Constitution are respected and to maintain the integrity of federal law enforcement."

See also **Mesarosh v. United States**, 352 U. S. 1, 14 (1956), and **McNabb v. United States**, 318 U. S. 332, 341 (1943). Surely, this Court should not condone or countenance the Government's intentional suppression for over five years of evidence within its possession and which is material

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[4] After the remand in the **O'Brien** case to the District Court in Michigan, O'Brien moved to require the Government to furnish the logs of the overheard conversations, but the Government chose not to reveal same and instead, dismissed the prosecution.

to the issue of whether the constitutional rights of petitioners were violated. **Brady v. Maryland**, 373 U. S. 83, 87 (1963); **Giles v. Maryland**, 386 U. S. 66 (1967). These cases impose on the prosecution the affirmative duty to "produce at the appropriate time" evidence material to a prosecution. **Williams v. Dutton**, 5 Cir., 3 Cr. L. Rep. 2473. Surely, only reversal of the convictions here will serve to deter the Government from similar affronts to the fairness of federal law enforcement.

In **Mapp v. Ohio**, 367 U. S. 643, 659 (1961), this Court held:

> "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence."

Further, this Court in **Mapp v. Ohio**, 367 U. S. at 659, cited with approval Mr. Justice Brandeis' dissenting opinion in **Olmstead v. United States**, 277 U. S. 438, 485 (1928), wherein he stated:

> "If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy."

That only a reversal of the convictions will act as an effective deterrent to the Government is indicated by the fact that the Government's suggested procedure here would be a mere continuation of its devious and stealthy policy of deception.

For the Government states that it intends to make an *ex parte* disclosure of the eavesdropping to the District Court. The Government suggests that thereafter the petitioners may, if they choose, file a motion for collateral relief. Obviously, such procedure would not at all conform to that procedure announced by this Court in **Hoffa v. United States**, 387 U. S. 231 (1967), and **Kolod v. United States**, 390 U. S. 136 (1968), to-wit, the remand by this Court to the District Court for an adversary proceeding

to determine whether the convictions were tainted by the electronic eavesdropping.

Thus, the Government seeks to divest itself from its burden of proving in an adversary proceeding that the convictions are free of the taint of the Government's misconduct, and that its violation of the Constitutional rights of the petitioners did not contribute to the obtaining of the judgments. **Chapman v. California,** 386 U. S. 18, 24 (1967); **Silverthorne Lumber Co. v. United States,** 251 U. S. 385, 392 (1920); **United States v. Coplon,** 2 Cir., 185 F. 2d 629 (1950).

Additionally, the government's suggested disposition of the instant case would not require the Government to make full and complete disclosure of its eavesdropping activities. Such disposition would not require the disclosure of conversations in which any of the defendants indicted below participated; would not require disclosure of conversations in which defense counsel or defense investigators participated; and would not require disclosure of conversations participated in by government witnesses, defense witnesses, and other related persons discussing the petitioners or the facts of this case. Though the Government now belatedly agrees that it should not be permitted to determine *ex parte* whether a conversation is arguably relevant to a conviction, yet the Government still maintains that it may determine *ex parte* whether a defendant has standing to object to illegally overheard conversations of other persons related to this case, and that it may determine *ex parte* whether the electronic surveillance was directed against a defendant or against another.

Not only would the Government's suggested disposition not act as an effective deterrent, but it would be manifestly unfair under the circumstances of this case. Two of petitioners have served almost twenty months of a sentence of three years. They are presently eligible for

parole under the provisions of Title 18, U. S. C., Section 4202, and will likely be entitled to release from their imprisonment within the next several months under the provisions of Title 18, U. S. C., Section 4161. Under these circumstances, only a setting aside of the convictions would constitute meaningful relief. Plainly, in this posture of the case, "adequate justification" exists for the reversal of the convictions of the petitioners. **Black v. United States**, 385 U. S. 26, 29 (1966).

CONCLUSION.

For the foregoing reasons, petitioners pray that this Court grant their petition for a writ of certiorari and set aside the convictions below.

Respectfully submitted,

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